

IN THE SUPREME COURT OF MISSOURI

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No. SC86096

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MURPHY COMPANY MECHANICAL CONTRACTORS & ENGINEERS,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

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On A Petition For Review From The Administrative Hearing Commission

Honorable June Streigel Doughty, Commissioner

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RESPONDENT'S BRIEF

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## *STATEMENT OF FACTS*

The Director of Revenue's statement of facts is incomplete. Therefore, Murphy Company Mechanical Contractors & Engineers submits this supplement pursuant to Rule 84.04(f).

### *The Nature Of Murphy Company's Business*

Murphy Company is a Missouri corporation headquartered in Olivette, Missouri. During the tax periods at issue here — 1999, 2000, and 2001 — it purchased computers, computer software and computer security systems that are identified in detail on Exhibit 18 and further described in the Transcript at 21-24, 26-32. The Administrative Hearing Commission found, and the Director no longer disputes, that most of the items for which Murphy Company claimed an exemption were items covered by the statute. *See* A9-A18, A27-A28. The Commission also found, and the Director no longer disputes, that Murphy Company is headquartered in the State of Missouri as required by the statute. *See* A24-A27.

Since 1983, Murphy Company has continuously held a corporate license, in good standing, to provide engineering services in Missouri. Its certificate of authority is No. E-755-D and its engineering license, issued by the Missouri Department of Economic Development, Division of Professional Registration is No. 000755. Ex. 19; Tr. 17.

Murphy Company has two lines of business that, in accord with recent trends in the construction industry, it has combined into one. It is a mechanical contractor that builds HVAC, plumbing and industrial piping systems. Tr. 13-14. It also employs one of the largest engineering staffs in the St. Louis metropolitan area to provide engineering design, verification that the design corresponds to the customer's specifications, and validation that the systems as built conform to the design. The combination of its mechanical contracting and engineering functions is known in the industry as "design/build." Simply put, this means that instead of having one company design a project and another build it, Murphy Company does both.

#### *The Design/Build Process*

The nature of the design/build process is described in Petitioner's Exhibit 20J, part of the marketing materials Murphy Company supplies to prospective customers. The traditional method of contracting for construction projects is to have an engineer design the project, to put it out for bids from contractors, and to have the selected contractor build it. Ex. 20J at 1. The engineer may also be hired to oversee the project to make sure that the plans conform to the customer's requirements ("verification"), and to ensure that the contractor builds the project according to the design ("validation"). Tr. 24, 26-27.

There were several problems inherent in this process. If, for example, the bid was over the customer's budget, then the engineers would have to re-design the job, and the customer would have to put it out for bids again. There were frequently disputes as to who was responsible for causing problems that arose during construction (and thus might have to pay for cost overruns), and who was responsible for fixing what was wrong. See Ex. 20J at 1-2; Tr. 14-16.

The design/build process avoids these problems. Under design/build one company designs the project, develops a budget to complete it, and has full responsibility for making sure that it is built in accordance with the plans and on time. If any problems arise, there is only one place to go — to the design/build company. Ex. 20J at 1; Tr. 14-16.

The design/build concept thus provides customers a number of advantages, including the establishment of a firm price at an early stage, one source of responsibility for all phases of the project from the planning to completion, and a guarantee that the project as built will meet the customer's requirements. Ex. 20J at 1. As a result, the market for design/build projects has grown 300% since 1986, and is estimated to command 50% of the construction market by 2005. Ex. 20J at 1.



### *Murphy's Design/Build Team*

In addition to competing with other engineering firms for design/build contracts, Murphy Company also competes with joint ventures between mechanical contractors who team with stand-alone engineering firms to bid on engineering/construction projects. Tr. 88. Murphy Company's engineering division plays an integral role in providing its design/build services. Its engineers design the project, while other employees provide construction services. Both can be performed almost simultaneously to design and build the project more quickly, more cheaply and with more immediate accountability to the client than when using the traditional "design-bid" process. Tr. 14-16.

In addition to the initial design phase, Murphy Company also provides engineering services on-site while the project is being built and after completion to validate that the finished projects will do what they are designed to do. Tr. 26-27, 43. Although Murphy Company's engineering division is fully capable of selling "stand alone" design engineering services, it does so only rarely as an accommodation to its existing customers. Tr. 13-16, 25-26.

Murphy Company has approximately 50 employees engaged in the design part of its design/build operations. It has 33 persons with engineering degrees, 28 in mechanical engineering and 5 in civil

engineering. Ex. 20B. During the three years at issue, the company employed 14 to 16 professional engineers licensed in 16 states, including Missouri. Tr. 18; Ex. 20C. Murphy Company itself is licensed as an engineering firm in Missouri, Ex. 19, and licensed to do business in 31 other states. Ex. 20B.

### *Murphy Company's Marketing Efforts*

The Director focused on Murphy Company's listing in the Yellow Pages directory, but ignored the company's principal advertising efforts. On its website (one of the most important methods of advertising a company's products and services today) Murphy Company described its design/build services as follows:

Murphy Company's Design/Build team is one of the *largest engineering groups* among mechanical contractors. Murphy performs comprehensive mechanical design services on either a single source design/build basis or as a design/assist partner. Design/assist can be as simple as constructability and design review to Murphy Company completion of detailed design documents.

Exhibit 21D (emphasis added).

The 2002 St. Louis Region Edition of *Sorkins Directory of Business & Government*, cited by the Director in its audit work papers, described the company's business as follows:

*In addition to its union craftsmen, Murphy also has an engineering staff of more than 50 and another 150 draftsmen and technical staff. If the engineering section was cleaved off of Murphy, it would rank as one of the largest engineering companies in the city. . . .*

*Murphy performs comprehensive mechanical design services on either a single-source design/build basis or as a design/assist partner. Murphy's involvement, from the concept phase, provides solutions sensitive to project schedules, constructive coordination and budget parameters. Projects include manufacturing plants, hospitals, retirement centers, prisons and multiuse facilities. . . .*

*Design/Build projects are those where Murphy takes full responsibility for design and construction of HVAC, plumbing and industrial process piping systems from the design concept through construction.*

Exhibit A at 62 (emphasis added).

Murphy Company advertises itself to the public as a design/build firm, providing both engineering and construction services. In addition to the advertisements provided on its website (Exhibit 21) and the

brochures it provides to potential customers (Exhibit 20), the words “Construction\* Engineers Mechanical\*Industrial” are found under the “Murphy” name on its trucks and trailers, and on its office signs. Ex. A at 66-68. Although Murphy Company is capable of offering “stand alone” engineering services and does so occasionally for existing customers at their request, it does not advertise itself as a “stand alone” engineering firm but rather, as a design/build (engineering/construction) firm. Tr. 14, 50-53.

*Murphy Company Revenues From Design/Build Contracts*

At the outset, it is important to note that the breakdown of revenues attributable to design engineering services and other services provided by Murphy Company to its customers is an estimate. The company does not charge its customers separately for the engineering work and the construction that goes into a project. The customer gets one price for everything. Tr. 48-49.

For internal budgeting purposes, Murphy Company does allocate revenues between its design engineering functions and its construction services. Tr. 48-49. Even this allocation, however, understates the revenues attributable to engineering work because it is not feasible to allocate the time an engineer spends on-site performing validation of the

design versus other tasks that might fall outside the strict definition of professional engineering work. Tr. 48, 58.

With those caveats, Murphy Company estimated that approximately 41% of its contracts were design/build contracts, and that these contracts produced approximately 21.5% of its total revenues for each of its three fiscal years overlapping the audit period from March 31, 2000 through March 31, 2002. Ex. 22. Although Murphy Company estimated that the “design engineering” portion of its design/build projects constituted only 2.36% of its *total* revenues, the revenues allocated to design engineering were nonetheless substantial.

Murphy Company estimated that it generated \$2,748,687.59 of design engineering revenue for its fiscal year ended March 31, 2002; \$4,625,176.60 of design engineering revenue for its fiscal year ended March 31, 2001; and \$3,484,950.81 of design engineering revenue for its fiscal year ended March 31, 2000, or a total of \$10,858,815 over the three year period at issue. Ex. 22. Moreover, (as noted above) the revenues attributable to the company’s non-design engineering services — *e.g.*, supervision of construction and on-site validation of the design — are included in the construction revenues. It is simply not possible to segregate those revenues from the company’s total revenues streams with any specificity. Tr. 48, 58.

Murphy Company's design engineering revenues alone are comparable to the revenues of five of the top twenty-five St. Louis-based engineering firms with approximately the same number of registered professional engineers (CDG Engineers Architects Planners, Inc., Oates Associates, Inc., Farnsworth Group, Inc., David Mason & Associates, Inc., and EDM, Inc.). See Ex. 24.

#### *ARGUMENT*

*The Administrative Hearing Commission Did Not Err In Finding That Murphy Company Is An "Engineering Firm" Within The Meaning Of § 144.030.2(28) Because Murphy Company Provides Engineering Services As Part Of Its Design/Build Contracts, And It Holds A Certificate Of Authority And A License To Provide Such Professional Engineering Services By The State Of Missouri*

#### *A.*

*An "Engineering Firm" Is One That Holds A Certificate Of Authority And License To Provide Professional Engineering Services*

The sole question before the Court is whether Murphy Company Mechanical Contractors & Engineers is an "engineering firm" within the meaning of § 144.030.2(28) RSMo 2000. The Director does not dispute that the equipment at issue consists of computers, computer software, or computer security systems exempted from sales and use tax if Murphy

Company is an engineering firm. The Director also no longer disputes that Murphy Company is headquartered in Missouri as required by the statute.

The statute does not define the term “engineering firm.” But a formal definition hardly seems needed. The legislature says that, unless used in a specialized, technical way, words and phrases in statutes are to be taken “in their plain or ordinary and usual sense.” § 1.090. The Director seems to agree with Murphy Company that an “engineering firm” is one that holds a license and certificate of authority from the State of Missouri to practice professional engineering. Murphy Company undoubtedly qualifies as an “engineering firm,” and thus for the tax exemption, on that basis. *See Ex. 19.*

B.

*The Director Has No Power To Add Language To § 144.030.2(28) To Make It Apply Only To Firms That “Primarily” Provide Engineering Services*

Where the parties disagree is whether § 144.030.2(28) imposes a further requirement on such a firm to be able to take advantage of the tax exemption — proof that it “primarily employs engineers and primarily provides engineering services.” App. Br. at 18.

An examination of § 144.030.2 as a whole demonstrates that the Legislature knew how to limit tax exemptions to certain items that were capable of multiple uses or activities, some of which were taxable and some of which were not. Section 144.030.2(26), for example, exempts sales of fuel consumed or used by waterborne vessels “which are used *primarily* in or for the transportation of property or cargo, or the conveyance of persons for hire.” Section 144.030.2(30) exempts the sale of barges “which are to be used *primarily* in the transportation of property or cargo on interstate waterways.” *See also Shipman v. Dominion Hospitality*, \_\_ S.W.3d \_\_, 2004 WL 2382743 (Mo. banc, October 26, 2004)(construing § 137.016.1(1) excluding “facilities used *primarily* for transient housing” from definition of “residential property” for property tax purposes).

The Director has no authority to add, remove, or otherwise modify the statutory language. *See Matteson v. Director of Revenue*, 909 S.W.2d 356, 360 (Mo. banc 1995). For example, in *May Department Stores Co. v. Department of Revenue*, 791 S.W.2d 388 (Mo. banc 1990), the question was whether the use tax should be applied to separately billed freight charges. The statute provided that such services were only to be included in the calculation if they were “part of the sale,” but the Director’s regulations provided that freight and shipping charges should always be



included in the calculation. This Court rejected the Director's position, holding that "the incidence of taxation is determined by statute and the Director has no power, through regulations or otherwise, to change the force of law." *Id.* at 389.

Section 144.030.2(28) does not use the word "primarily." It does not require that an engineering firm employ any particular number of licensed professional engineers (although, of course, it must employ at least one, § 327.401.2). The statute imposes no source of revenue test, nor does it require that any particular percentage of an engineering firm's revenues come from the engineering services.

C.

*Murphy Company Must Comply With The Engineering Licensing Statutes To Provide Design And Other Professional Engineering Services, And It Has A Certificate Of Authority And License To Provide Such Services From The State Of Missouri*

The *only* statutory requirement in § 144.030.2(28) is that the taxpayer *be* an "engineering firm." While perhaps not strictly *in pari materia* with § 144.030.2(28), the licensing statutes define what it means to be an engineer and an engineering firm in Missouri. Section 327.181 provides that a person acts as a professional engineer:

who renders or offers to render or holds himself or herself out as willing or able to render any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, . . . , the coordination of services furnished by structural, civil, mechanical and electrical engineers and other consultants as they relate to engineering work and the inspection of construction for the purpose of compliance with drawings and specifications, any of which embraces such service or work either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems or projects and including such architectural work as is incidental to the practice of engineering; or who uses the title “professional engineer” or “consulting engineer” or the word “engineer” alone or preceded by any word indicating or implying that such person is or holds himself or herself out to be a professional engineer, or who shall use any word or words, letters, figures, degrees, titles or other

description indicating or implying that such person is a professional engineer or is willing or able to practice engineering.

A “person” includes “any person, corporation, firm, partnership, association, or other entity.” § 327.011(6). The legislature has also defined “firm,” as it relates to the provision of engineering services to the State to mean “any individual, firm, partnership, corporation, association or other legal entity permitted by law to practice the profession of . . . engineering . . . and provide said services.” § 8.287(4).

Section 327.401.2 requires any corporation that has “as one of its purposes the practicing of . . . professional engineering . . . [to] obtain a certificate of authority for each profession named in the articles of incorporation.” Such a corporation must assign a professional engineer licensed and authorized to practice in Missouri to be “personally in charge” and to supervise the professional engineering work, such as the design engineering phase of a design/build project. §§ 327.401.2(1), (2).

Thus, an “engineering firm” is one that is authorized by law to practice engineering. Murphy Company has a certificate of authority from, and is licensed by, the State of Missouri to act as a professional engineering firm, Ex. 19. During the tax period Murphy Company had from 14 to 16 professional engineers licensed in Missouri (as well as 15 other states) among its employees. T. 18; Ex. 20B. Moreover, the

company employed several other persons with engineering training who are not themselves licensed as professional engineers, all of whom work under the supervision of licensed professional engineers. See §§ 327.191(1), 327.401.2(2).

Murphy Company's engineers involved in its design/build activities are practicing engineering. Its design/build team provides "consultation, investigation, evaluation, planning and design of engineering works and systems [and] the coordination of services furnished by structural, civil, mechanical and electrical engineers and other consultants as they relate to engineering work and the inspection of construction for the purpose of compliance with drawings and specifications." Tr. 14-16, 24, 25, 26-27, 43; § 327.181.

D.

*Murphy Company Holds Itself Out As An Engineering Firm That Provides The "Design," Verification, And Validation Engineering Components Of Design/Build Contracts, As Well As The Construction Services*

The company uses the word "engineers" in its corporate name and holds itself out to the public as "engineers." See Exs. 20, 21; Ex. A at 66-68. It describes its services on its website and in its written marketing materials as including design engineering as part of the design/build

process. See Exs. 20, 21. Thus, Murphy Company holds itself out to the public as performing engineering services, albeit primarily as part of a design-build process.

Murphy Company could not legally do any of these things unless it was licensed by the State of Missouri as an engineering firm. See §§ 327.181, 327.401.2. And of course, Murphy Company is licensed by the State to perform engineering services and holds a certificate of authority to practice engineering. See Ex. 19. Simply put, Murphy Company is a design/build contractor that is required to register as an engineering firm in Missouri under Section 327.401.2, regardless of what other services it may provide.

The Director does not explain why Murphy Company needs a certificate of authority and an engineering license if it isn't an engineering firm. The Director doesn't do so because that contention makes no sense in light of the statutory scheme governing engineers.

The Director suggests that the legislation passed in 2002 regulating design/build contractors shows that Murphy Company is not an engineering firm under § 144.030.2(28) because the General Assembly did not make a conforming amendment to the tax exemption. App. Br. at 16-17. The Director's argument is a *non sequitur*.

Section 327.465 RSMo. Cum. Supp. 2002 requires “design-build” contractors either to subcontract with licensed engineers to provide the “design” portion of their contracts, or to be licensed engineers themselves. The statute defines a “design build contractor” to be a company that furnishes “*engineering services* and contractor services either directly or through subcontractors.” § 327.465.1(3) (emphasis added).

This statute does not affect who is an engineering firm. It merely clarifies that any firm that works as a design/build contractor must have the “design” phase of its work done by licensed professional engineers. A firm can do more than just engineering and still qualify for the tax exemption — even the Director concedes that. *See App. Br.* at 18.

That the Legislature did not amend § 144.030.2(28) to include “design/build” firms makes perfect sense. Under § 327.465, a firm can be a “design/build” contractor even if it doesn’t have licensed professional engineers on its staff. In that event, it must contract with an engineering firm to do the engineering phase of the design/build process.

The Legislature did not intend to provide a tax exemption to “design/build” firms that didn’t have licensed professional engineers in their employ because such firms don’t perform engineering services — they subcontract for them. The exemption is for “engineering firms.”

Murphy Company has a large professional engineering staff *and* a contractor division. Thus, it was an engineering firm long before 2002, and remains one.

The Director places great reliance on the fact that engineering services do not produce the majority of Murphy Company's gross revenues. App. Br. at 19. The company's engineering services are, in fact, substantial. It generated from \$2.75 million to \$4.625 million annually just in fees allocated to the design phase of the business. Ex. 22. The annual revenues attributable to engineering work performed on the construction site is not included in these figures, Tr. 48, 58, and thus Exhibit 22 understates the company's total revenues from engineering services.

Moreover, it is important to note the obvious — in a design/build contract, the revenues derived from designing and validating a mechanical system for a building are always going to be much smaller than the revenue derived from actually constructing such a system. Design and validation engineering services do not require the purchase of building materials, supplies and other hardware necessary to create the mechanical system, and do not require the comparatively larger amount of manual labor that is necessary to actually build the project. For instance, while it might take only one licensed professional engineer and

a small staff to design and validate the mechanical systems for a hospital, it would obviously require an enormous amount of structural materials, hardware and supplies, and more than just one construction worker to build those systems.

The Director suggests that Murphy Company's failure to advertise in the Yellow Pages under "engineers" is a fact of some significance. App. Br. at 19. It is not. The Yellow Pages have a disclaimer before the entries for "professional engineers" that reads:

For your convenience, these professional engineers have arranged for their names to be listed under the discipline in which they specialize. *These listings may not represent all professional engineers*, nor are the specialties listed necessarily board or otherwise certified.

Ex. A at 49 (emphasis added).

Murphy Company's written marketing materials and website make numerous references to its engineering capabilities. Exhibit 20A notes that the firm employs professional engineers and a technical staff that includes 50 engineering personnel. Exhibit 20B lists by name, degree, university and specialty the person comprising its engineering staff. Exhibit 20C lists the company's registered professional engineers and the state in which they are licensed. Exhibit 20D lists the engineers'



professional affiliations. Exhibit 20E lists the states in which the company is licensed. Exhibit 20F describes the company's design capabilities in the section entitled "Engineers," and refers repeatedly to its design capabilities in the other sections. Exhibit 20J explains the design/build concept and its advantages over the traditional "design-bid-build" process.

Murphy Company's website refers repeatedly to its engineering activities. For example, the section on design/build points out that Murphy Company's design/build team "is one of the largest engineering groups among mechanical contractors," and that Murphy Company can provide design engineering or value engineering. Ex. 21D at 1, 2.

In short, Murphy Company is an "engineering firm" by any definition of that term. The Commission correctly construed and applied § 144.030.2(28). Its decision should be affirmed.

### *CONCLUSION*

The Court should give § 144.030.2(28) a reasonable, natural and practical interpretation that effectuates the Legislature's purpose. Murphy Company is required to register as a professional engineering firm for purposes of Missouri's licensing laws to legally conduct the design phase of its design/build contracts, and it was required to do so long before § 327.465 was added to the licensing laws. That legal

requirement is sufficient to establish that Murphy Company is an “engineering firm” for purposes of qualifying for the exemption provided for engineering firms. The licensing statutes take a practical and common-sense approach — any company that performs professional engineering services, no matter what else it does, must be licensed as an engineer. The Court should apply the same principle in deciding what it means to be an “engineering firm” for purposes of the sales and use tax exemption.

For the foregoing reasons, Murphy Company requests the Court to affirm the decision of the Administrative Hearing Commission, and to grant such other relief as the Court deems proper in the circumstances.

Respectfully submitted,

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*CERTIFICATE OF COMPLIANCE*

The undersigned hereby certifies that this brief contains the information by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 4,041 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Century Schoolbook font; and includes a virus free 3.5" floppy disk in Microsoft Word 2003 format.

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*CERTIFICATE OF SERVICE*

The undersigned hereby certifies that two copies of the foregoing brief and one, virus-free diskette, containing an electronic copy of the brief, was mailed first class, postage prepaid, this \_\_\_\_ day of November, 2004 to:

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